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In the Supreme Court of the United States

OCTOBER TERM, 1973

73-21

No. 7321

T. R. GRUBBS, D/B/A T. R. GRUBBS
TIRE & APPLIANCE,
Petitioner,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

While 28 U.S.C. §1254(1) may be the statutory basis for invoking this Court's jurisdiction, Respondent's position is that review on writ of certiorari should not be granted in the present case under the standards prescribed by this Court in its Rule 19 and under well-established principles announced by this Court in numerous prior decisions. This position will be developed more fully hereinafter in this Brief.

QUESTIONS PRESENTED

Respondent disputes the comments of Petitioner in his Petition under the heading of "QUESTIONS RAISED". Respondent respectfully submits that the questions presented here should be stated more accurately as follows:

1. Should review on writ of certiorari be granted in this case when the judgment of the Court of Appeals reversed and remanded the case to the trial court for further proceedings on material aspects of the controversies between Petitioner and Respondent?

2. Should review on writ of certiorari be granted in this case where the judgment of the Court of Appeals does not conflict with any applicable decision of this Court either on a "federal question" or on any other kind of question?

3. Should review on writ of certiorari be granted in this case where the alleged conflicting decision was never called to the attention of the Court of Appeals?

4. Should review on writ of certiorari be granted in this case where a primary purpose is to ask this Court to review the evidence or inferences from it?

5. Should review on writ of certiorari be granted in this case where a primary purpose is to ask this Court to construe and interpret Texas law as such law has been decided by the Supreme Court of Texas?

6. Should review on writ of certiorari be granted in this case where no special or important reasons therefor are shown to exist?

7. Should review on writ of certiorari be granted in this case where the Court of Appeals did not commit error in construing the evidence and inferences from it or in applying governing Texas law to the evidence contained in the record?

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the posture of the case in the trial court and before it, and the opinion itself shows what the Court of Appeals did. For this reason Respondent does not deem it necessary or helpful to extend this Brief by an extended statement at this point.

ARGUMENT

I.

The Judgment Was Not Final

The opinion of the Court of Appeals clearly shows that the Court of Appeals did not reverse and render a judgment in favor of Respondent. See page A10 of Appendix A to the Petition. The order of the Court of Appeals was "REVERSED AND REMANDED", and it was quite clear that the case was remanded for further proceedings in the trial court on certain indicated issues. This Court has held consistently that a judgment of reversal with leave for further proceedings in the court below is not the type of final judgment to be brought to this Court on writ of error. *Bostwick* v. *Brinkerhoff,* 106 U.S. 3, 1 S.Ct. 15, 27 L.Ed. 73 (1882); *Wilson* v. *Republic Iron & Steel Co.,* 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921). This rule is a very sensible rule designed to dispense with piecemeal appeals. For example, in the present case it cannot be predicted with certainty or preciseness what the trial court will do in the further proceedings before it under the order of the Court of Appeals remanding the case for further proceedings. At that later stage additional appeals and even petitions to this Court are well within the realm of possibility. Granted that there may be cases where judgments remanding a case to a trial court for further proceedings might have sufficient finality to justify present review before the completion of such further proceedings, Respondent respectfully submits that this present case is not one of those exceptional cases.

II.

There Is No Conflict of Decisions

Section 1(b) of this Court's Rule 19 expressly refers to a conflict in decisions involving "a federal question". Since in the present case the Court of Appeals did not decide any "federal question", there really is no way that it could be said that the Court of Appeals in the present case had "decided a federal question in a way in conflict with applicable decisions of this Court"; and that is the type of "conflict" expressly referred to in this Court's Rule 19.

Furthermore, there is no conflict between the decision of the Court of Appeals in the present case and the decision of this Court in the case cited by Petitioner in his Petition. *Schmidt & Story* v. *Bank of Commerce,* 234 U.S. 64, 34 S.Ct. 730, 58 L.Ed. 1214 (1913). That case came to this Court from the Supreme Court of New Mexico. It involved the construction of the New Mexico version of the Negotiable Instruments Act as it existed in 1907 and in 1913. It involved the rights and obligations of accommodation makers on a renewal note which had been obtained on the basis of allegedly fraudulent representations. Mr. Grubbs was not signing any paper as a surety or as an accommodation party. He was obligated under a written repurchase obligation covering chattel notes which he had previously sold for cash. Respondent respectfully submits that the 1913 decision of this Court in the case involving the New Mexico statute was completely distinguishable both as to the facts and as to the applicable law from those involved in the present case. A mere reading of the two decisions demonstrates the absence of any conflict either as to a "federal question" or as to any other question.

III.

The Alleged Conflict Was Not Called to the Attention of the Appeals Court

With all the emphasis in the Petition on the alleged conflict one might assume that the 1913 decision in the case that came to this Court from New Mexico was urged on the Court of Appeals. That was not the case. As far as the record shows the Court of Appeals was not even asked to consider this Court's said 1913 decision. In *Duignan* v. *United States,* 274 U.S. 195, 71 L.Ed. 996 (1926), this Court stated:

> "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed."

Respondent recognizes that this general principle might not extend to presentation of actual court decisions, but it does appear to have some bearing when review on writ of certiorari is based primarily on an alleged conflict with or failure to follow a prior decision of this Court. It seems only fair that the 1913 decision should have been called to the attention of the Court of Appeals.

IV.

Certiorari Should Not Be Granted Merely to Review the Evidence

It is obvious from his Petition that Petitioner feels that the Court of Appeals did not properly review the evidence. While Respondent disagrees with that position, it suggests that review by writ of certiorari ought not to be

granted to correct any such alleged errors. In *United States* v. *Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925, this Court stated:

> "We do not grant a certiorari to review evidence and discuss specific facts."

The same sound rule was announced and followed in *General Talking Pictures Corp.* v. *Western Electric Company*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1937).

V.

There Should Be No Review to Construe Texas Decisions on State Law

Petitioner does not agree with what the Court of Appeals had to say about decisions of the Texas Supreme Court on evidence of agency and other non-federal questions. This is not the type of matter with which this Court should concern itself. This was the holding in *C.I.R.* v. *Bosch's Estate*, 387 U.S. 456, 87 S.Ct. 1776 (1967). Circuit Judge Thornberry, the writer of the opinion of the Court of Appeals, has been a Texas lawyer for over 35 years. In his opinion on the agency question he cites a case by the Supreme Court of Texas decided as recently as 1971. In this area of local law there seems to be no real purpose to be served by this Court undertaking to decide whether the Court of Appeals correctly construed and applied the Texas court decisions on a non-federal question.

VI.

No Special or Important Reason for Review Is Shown to Exist

Petitioner concentrates on the "importance" of review to him, but this very emphasis demonstrates that the "importance" of the issue concerns only the parties to this litigation. It would seem that importance of the issues to be reviewed by this Court should be viewed from the standpoint of importance to the public as distinguished from importance to the particular parties involved. *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923). Assuming the accuracy of this premise, "important reasons" within the concept of this Court's Rule 19 do not exist.

VII.

The Court of Appeals Did Not Commit Error

Respondent respectfully submits that the Court of Appeals carefully reviewed the complete record before it, read and considered full briefs submitted by counsel for Petitioner and Respondent, heard oral argument by such counsel including responses to questions asked during such argument, and then considered all of this deliberately and carefully in preparing its opinion and judgment. Respondent's position is that the Court of Appeals did not commit any error but that it correctly applied Texas law to the full record before it.

CONCLUSION

For the foregoing reasons it is respectfully submitted the Petition for a Writ of Certiorari filed in this case should be denied.

Respectfully submitted,

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A copy of this Brief is being mailed to Mr. J. R. Cornelius, 123 North Polk Street, Jefferson, Texas 75657, attorney for Petitioner, on July 20, 1973.

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